SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 172.

ELMER L. DIRKS,
Individually and as General Chairman of the
BROTHERHOOD OF RAILROAD TRAINMEN,
an Unincorporated Association, and
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RY. CO.,
a Corporation,
Petitioners,

vs.

W. L. BIRKHOLZ, RAY GRANGER, THOMAS FOLEY,
DAVID TUCIBAT, WAYNE BLACKBURN, and
MARVIN HOISINGTON,
Individually and in Behalf of All Members of the Switchmen's Union of North America, AFL-CIO, Who Are Employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and
SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO,
an Unincorporated Association,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS AS AMICUS CURIAE.

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INTEREST OF AMICUS CURIAE.

The Brotherhood of Locomotive Engineers ("BLE") * is the collective bargaining representative for the craft of locomotive engineers on the vast majority of the nation's major railroads. In some instances, it is also the bargain-

* This brief *amicus curiae* is filed pursuant to consents given by all parties to the above titled case and mailed to the Clerk of this Court on November 18, 1968.

ing representative for the craft of firemen.[1] As a railway labor organization, national in scope and organized in accordance with the Railway Labor Act, BLE designates one of the five labor representatives on the First Division of the National Railroad Adjustment Board, which designee is one of the Brotherhood's vice-presidents. The other operating organizations qualified to designate a labor representative on the Adjustment Board, First Division, are the petitioner Brotherhood of Railroad Trainmen, the respondent Switchmen's Union of North America, Order of Railway Conductors & Brakemen, and Brotherhood of Locomotive Firemen and Enginemen. The latter organization, as bargaining representative for the craft of locomotive firemen on most rail carriers, is the avowed antagonist of BLE in a rivalry which has intensified and escalated after the award was issued by Arbitration Board No. 282 in 1964.

On most railroads where BLE is bargaining representative for the craft of locomotive engineers, it has negotiated union security agreements embodying the statutory language contained in Section 2, Eleventh (c) of the Railway Labor Act (45 U.S.C. § 152, Eleventh (c)). During the past several years, however, BLE has entered into union security agreements with several railroads, which agreements provide, as does the agreement in issue, that those employees regularly assigned and working in the craft represented by BLE, who do not hold interchangeable rights in a craft represented by another union, must as a condition of continued employment acquire and retain membership in the BLE.

For example, BLE is the certified representative for both the crafts of locomotive engineers and firemen on the

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[1] Thirty-Third Annual Report of the National Mediation Board, pp. 98-100 (Wash., D.C. 1968) (referring to employee representation on a selected group of rail carriers).

Richmond, Fredericksburg & Potomac Railroad Company. On December 20, 1966, BLE negotiated a union security agreement which requires the locomotive engineers and firemen employed by that rail carrier to become and remain members of BLE. The agreement further stipulates that employees who are not regularly assigned and working in the crafts of locomotive engineers and firemen, but hold seniority rights in another craft, need not be members of BLE. These individuals may satisfy the membership requirement by holding or acquiring membership in any of the standard operating unions which may hold the bargaining rights on the Richmond, Fredericksburg & Potomac for the craft in which those employees may be regularly working.[2] The agreement also provides that employees who retain seniority in the crafts represented by BLE and who continue in any service covered by BLE collective agreements for thirty calendar days or more shall be considered regularly assigned employees. The Brotherhood of Locomotive Firemen & Enginemen ("BLF&E") objected to this agreement because it has no contract with the railroad,[3] and its members on that property could not, therefore, satisfy the requirements of the union security agreement.

Subsequently, BLF&E and three officers and members thereof brought suit in the United States District Court for the Eastern District of Virginia against BLE and the railroad seeking a declaratory judgment, injunctive relief

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[2] However, none of the employees in the crafts represented by BLE on this railroad hold employment rights or perform temporary services in any craft for which BLE is not the certified bargaining representative.

[3] As minority union, BLF&E is legally prohibited from negotiating such contracts for its members. See *Virginian Ry. Co. v. System Federation*, 300 U.S. 515 (1937); *Switchmen's Union v. Southern Pacific Co.*, 253 F. 2d 81 (9th Cir. 1958), *cert. denied*, 358 U.S. 818 (1958).

and damages. On September 12, 1968, the District Court published a memorandum opinion declaring BLE's union security agreement invalid insofar as membership in BLF&E would not satisfy the requirements thereof. The ruling was based on the decisions rendered by the United States Court of Appeals in the instant case, *Birkholz v. Dirks*, 391 F. 2d 289 (7th Cir. 1968), and by the United States Court of Appeals for the Second Circuit in *O'Connell v. Erie Lackawanna R. Co.*, 391 F. 2d 156 (2d Cir. 1968). On the other hand, the court stated that the holding in *Rohrer v. Conemaugh & Black Lick R. Co.*, 369 F. 2d 127 (3rd Cir. 1966), clearly sustained the position of the BLE.[4] Thus, the questions involved are the same as those presented for decision in the instant case:

1) Whether a union security agreement between a railroad and the statutory representative of its employees in an operating craft violates the Railway Labor Act, unless it permits the employee to satisfy his membership obligations by joining a rival minority union that cannot negotiate with the carrier because it has not been designated a bargaining representative of any craft on the railroad; and

2) Whether an employee, who does not hold interchangeable rights in a craft represented by another union and, in fact, is regularly assigned and working in the craft covered by the union security agreement in question, may satisfy the membership obligations thereof by belonging to any one of the five "qualified" labor organizations.

Further, enactment of Public Law 88-108, August 22, 1963, 77 Stat. 132 (45 U.S.C.A. § 157, 1967 Pocket Supp. at 151-2), and the award of Arbitration Board No. 282,

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[4] The District Court has not yet entered a final appealable order in Civil Action No. 4398 (E. D. Va.).

41 LAB. ARB. 673, has, by sharply reducing BLF&E's active membership base,[5] motivated it to invade the traditional representational jurisdiction of BLE and to increase its efforts to enlist members from the most practicable source available to it, locomotive engineers. In view of simultaneous efforts to reduce the consist of train crews, including brakemen, it would appear that the "continued contraction of employment opportunities" in the operating crafts "will serve to buttress [the] traditional rivalry" for members among the unions representing the operating crafts. Levinson, "The Railway Labor Act—The Record of a Decade," 3 LAB. L. J. 13, at 26-27 (Jan. 1962). Under the theory expressed in the opinion of the court below, membership by a locomotive engineer in any of the four organizations other than BLE, including those representing the crafts most adversely affected by the technological changes occurring in the railroad industry, is permissible under the guise of "intercraft mobility." Thus, in addition to BLF&E, the three organizations representing conductors and road and yard trainmen can, and probably will, solicit membership among the engineers or employees in the other operating crafts.

After having determined that a railroad employee in the operating crafts has the right to satisfy the membership requirements of a union security agreement by belonging to any one of the five operating craft unions, the Seventh Circuit subsequently held in *McElroy v. Terminal Railroad Association,* 392 F. 2d 966 (7th Cir. 1968), petition for cert. filed, 37 U.S.L. WEEK 3013 (U.S. May 10,

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[5] 18,000 firemen were severed from employment during 1963 to 1966. *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.,* 385 F. 2d 581, at 610 (D.C. Cir. 1967). Where there were some 38,000 firemen in 1963, the Interstate Commerce Commission in its M-300 Reports for April 1967, indicated the number has been reduced to about 19,000.

1968), on the basis of its decision herein, that locomotive engineers, who are members of BLF&E, can designate that union to represent them in grievance handling and disciplinary investigations as to matters occurring while they perform service as locomotive engineers. This holding was reached even though BLE's agreement was involved and BLE as the certified representative of the craft would not have an opportunity to be present at the adjustment of the grievances. Taken together, the two decisions effectively fragmentize collective bargaining and representation in the railroad operating crafts.

BLE has a vital interest in this litigation, for the rationale underlying these and similar decisions encourages turmoil and agitation on union matters among the railroad operating employees. This Court's decision in the present case will not only affect union security agreements among the railroad operating crafts but will determine, in a critical respect, the extent the craft representative will remain an effective vehicle to achieve stability in labor relations. It is anticipated that a denial of the petitioners' contentions will serve to create the belief that in these five railroad crafts the majority representative's exclusive authority is limited to negotiation and execution of the basic labor contract.

This brief supports the view of petitioners that Section 2, Eleventh (c) of the Act does not invalidate a union security agreement that (1) does not allow an employee to satisfy the compulsory membership requirements by joining a rival minority union, which is not a bargaining representative of any craft on the railroad, and (2) does not permit an employee, who is not involved in shuttling back and forth between crafts represented by different unions, to satisfy the membership requirements by belonging to a union other than the designated craft representative.

SUMMARY OF ARGUMENT.

The policy behind the union shop amendments to the Railway Labor Act was to permit the railroad and the majority representative of a craft to enter into agreements compelling the employees therein to financially support the activities of the collective bargaining agent in negotiating and administering the bargaining agreements for that craft. Allowing employees in the operating crafts to satisfy the membership requirements of a union shop agreement by belonging to a minority union, which is a rival of the craft representative and which does not have any bargaining functions for that or any other craft of employees on the involved railroad, would defeat that concept.

As this Court has found, Section 2, Eleventh (c) was enacted for the narrow and exclusive purpose of protecting only those employees subject to temporary intercraft transfers from having to join more than one union having union security agreements with the carrier. This subparagraph was not inserted to allow an employee the absolute right to choose the union to which he desired to belong; nor was it included to benefit minority unions competing with the majority representative for bargaining rights to a craft. However, a literal reading of this subsection is based on the erroneous conclusion that Congress intended to foster rival minority unions within a craft. Further, the literal application thereof would permit an employee in any of the operating crafts to hold membership in any of the five unions that have representatives on the National Railroad Adjustment Board in satisfaction of the membership requirements of a union shop agreement. Rather than reaching these results, the provisions of section 2, Eleventh (c) were limited to allow only those employees involved in situations of shuttling back and forth between crafts represented by different unions

to belong to either of the bargaining representatives. There was never any understanding that said employee could satisfy his membership obligations by belonging to a union which is not the bargaining representative of the carrier for one of the interrelated crafts, for that employee could never be confronted with the dilemma of dual union membership arising out of inter-craft mobility. For the same reason, an employee, who is regularly employed in a craft and who, therefore, is unable to exercise or does not hold employment rights in another craft, may be required to join and retain membership in the labor organization representing his craft.

ARGUMENT.

I. The union shop amendments to the Railway Labor Act were designed to permit the bargaining representative to compel all employees who receive the benefits of the collective bargaining agreement to contribute to the support of the union which negotiates and enforces the agreement.

In passing section 2, Eleventh of the Railway Labor Act in 1951 (45 U.S.C. 152, Eleventh, 64 Stat. 1238), Congress lifted the prohibition against union shop agreements which had been inserted in the Act in 1934 (§ 2, Fourth and Fifth, 48 Stat. 1186). Section 2, Eleventh (a) of the Railway Labor Act specifically authorizes union shop agreements, also known as union security agreements, only where made by a "labor organization representing their craft or class." [6] The purpose of this provision is to

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[6] Section 2, Eleventh (a) provides: "Notwithstanding any other provisions of this Act * * *, any carriers or labor organizations * * * shall be permitted (a) to make agreements requiring as a condition of continued employment, that within sixty (60) days * * * all employees shall become members of the labor organization *representing their craft or class* * * *." (Emphasis supplied.)

allow the parties by agreement to compel "financial support of the *collective bargaining agency* by all who receive the benefit of *its* work." *Railway Employees Department v. Hanson*, 351 U.S. 225, at 238 (1956).

The legislative history is clear that the amendments permit the union shop solely to "force employees to share the costs of negotiating and administering collective agreements, and the cost of the adjustment and settlement of disputes" and that the only financial support which may be required is that which "directly relates to the work of the union in the realm of collective bargaining." *International Association of Machinists v. Street*, 367 U.S. 740, at 763-4 (1961).

The amendments were not addressed to the benefit of unions generally or even those railroad unions entitled to elect representatives to the National Railroad Adjustment Board. As this Court stated in *Machinists v. Street, supra* at 754:

> "The primary union and congressional concern was with the elimination of the 'free rider' who did not support *his* representative's performance of *its* functions under the Act." (Emphasis supplied.)

Congress was aware that the bargaining representative's participation in the "comprehensive administrative apparatus" created by the Railway Labor Act was more costly because "more complex than that of any other industry." *Machinists v. Street, supra* at 755. And these obligations are far more extensive than merely participating in the selection of the labor representatives to the National Railroad Adjustment Board.

Again referring to the Richmond, Fredericksburg & Potomac Railroad, the BLE, as statutory representative of both engineer and firemen, must establish and bear the full expense of a General Committee of Adjustment

charged with negotiating and enforcing collective bargaining agreements covering approximately 140 employees. The General Committee must pay its officers, provide for clerical help, and must bear all of the other usual administrative expenses. The officers must travel, at General Committee expense, in the performance of their day-to-day-duties for the benefit of the employees represented. Lawyers are retained to assist the BLE and the General Committee in its wide range of activities growing out of the negotiation and enforcement of agreements.

In its position as exclusive bargaining agent for all employees covered by its contract, the BLE is under a legally enforceable duty to represent all employees in the craft fairly and without discrimination. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944).

A rival minority union, on the other hand, lacks any statutory obligations to its members or other employees of the carrier. It is not required to represent them, nor has it any labor agreement with the carrier to negotiate or administer. This is the exclusive work of the certified representative.

None of the monies received by the minority union is used to defray expenses incurred by the exclusive representative. On the contrary, its expenses as the "out" union are simply organizational in nature, those it chooses to incur in its effort to undermine the "representative's performance of its functions under the Act." *Machinists v. Street*, 367 U.S. 740, at 754.

Sponsors of the union shop bill also urged its enactment to stabilize labor relations in the industry by making it more difficult for another railroad union to raid an established unit, and to reduce "turmoil" and "agitation"

on union matters among railroad employees.[7] As this Court has discerned, no part of the union shop amendments was intended to assist a "dissident * * * union [to] recruit new members." *Pennsylvania Railroad Co. v. Rychlik,* 352 U.S. 480, at 489 (1957). In this regard, as previously noted, BLF&E is a professed rival of the BLE for bargaining rights in various railroad properties.

Any statutory requirement that, as the price of a union shop contract, BLE must subsidize BLF&E's rival organizational efforts through alternative membership provisions would place BLE in an intolerable, competitive situation. Because the minority union's dues need not reflect the substantial expenses of representation, they are often lower than those of the bargaining representative. Thus, if the position taken by the court below is sustained, the statute would actually encourage employees to join an irresponsible union in order to avoid paying a full share of the costs of collective bargaining which, as this Court has recognized, defeats the very purpose of the union shop amendments to the Railway Labor Act.[8]

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[7] Railroad labor spokesman George Harrison, whose statement to the Committees in support of the amendment has been deemed authoritative (367 U.S. at 761), argued this point repeatedly: "The union shop makes it more difficult for one union to raid another, and thus eliminates or reduces weeks and months of turmoil among employees. * * * When your unions operate on a voluntary basis of attracting members, the union is continually on the job agitating for more. In other words, you have got to be militant all the time for people to understand that you are out fighting for their interest. * * * Many times you are forced to handle insignificant violations of your contract because a bunch of your members tell you that they are going to quit paying dues if you do not, and you process a lot of nuisance claims. You will get rid of all of that if you have a union shop." Hearings on H. R. 7789 Before Committee of Interstate and Foreign Commerce, 81st Cong. 2d Sess. 11, 22-23 (1950).

[8] "Employees would be tempted to desert the organization of the bargaining representative which was assuming its respon-

(Continued on following page)

In short, a construction of the statute permitting minority unions to benefit from the incumbent's union shop agreement fractures every purpose that convinced Congress to enact the 1951 amendment. It frustrates the primary concern of requiring employees to contribute their share of the cost of collective bargaining. In their current position, members of rival minority unions would be no different than employees who are members of no union at all; they receive all benefits but contribute nothing to the bargaining agent.

II. The sole purpose of the alternative union membership provision of section 2, Eleventh (c) is to protect employees subject to temporary intercraft transfers from a duty to join more than one of the organizations having union security agreements with the carrier.

From reading the opinion below, it is apparent that the Court of Appeals relied solely on a literal reading of section 2, Eleventh (c),[9] in support of the position that the statute commands the absurd result of permitting an employee who has, for instance, worked regularly for many

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(Continued from preceding page)

sibilities under the Act in favor of another union which was not * * * and which could thereby offer cheaper dues. This would defeat the very purpose of the union [shop] amendments which is to compel each employee to contribute his part to the bargaining representative's activities in his behalf including its participation in the administrative machinery of the Act." *Machinists v. Street, supra* at 764.

[9] 391 F. 2d at 292, 293, where the court accepts a "literal reading" of the section, thereby removing any need for the two provisos to the primary paragraph. For example, if a newly hired fireman may belong to any of five unions, no purpose is served by the first proviso requiring him to join the representative of the craft of firemen. And no purpose is served by the second proviso allowing the employee to shuttle between unions as he shuttles between crafts if he may satisfy his obligation by membership in any of the five unions.

years in the crafts represented by the BLE to belong to another "qualified" organization which does not represent any employees on that railroad. However, this Court has already held that this "disarmingly clear" language cannot be applied literally but must be limited in its scope by construction "in light of the policy [it] was intended to serve." [10] We contend that the clear and compelling interpretation of section 2, Eleventh (c) by this Court in *Rychlik, supra,* controls the issues here.

In *Rychlik,* an employee was discharged by the railroad under a union shop provision drafted in the language of the statute after he resigned his membership in the bargaining representative and joined UROC, a newly organ-

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[10] "At first glance the language of section 2, Eleventh (c) would appear to be disarmingly clear: union-shop contracts are satisfied if the employee belongs to any union which happens to be national in scope and organized in accordance with the Act. * * * However, as so often happens, when the language of the statute is read, not in a vacuum, but in the light of the policies this section was intended to serve, it becomes clear that the purpose of Congress was not, as respondent contends, to give employees in the railroad industry any blanket right to join unions other than the authorized bargaining representative or to help dissident or rising new unions recruit new members. Rather the sole aim of the provisions was to protect employees from the requirement of dual unionism in an industry with high job mobility, and thus to confer on qualified craft unions the right to assure members employment security, even *if the member should be working temporarily in a craft for which another union is the bargaining representative.*" *Pennsylvania RR Co. v. Rychlik,* 352 U.S. 480, at 488 (1957). (Emphasis supplied.) The fact that an employee could never be working temporarily in a craft for which another union is the bargaining representative, but could according to the opinion below satisfy the union shop obligations by belonging to another of the "qualified" organizations having a representative on the First Division of the Adjustment Board, points up the peculiar results which can be reached by a broad literal interpretation of the section. It is submitted that the draftsmen did not intend to permit a conductor to belong to BLE or to have an engineer satisfy his obligation by membership in the Switchmen's Union. But respondents of necessity must be committed to this proposition.

ized industrial-type union seeking to represent all operating employees. UROC held no contracts on the property but argued, as do the respondents herein, that it met all of the express conditions of section 2, Eleventh (c), *i.e.*, it was in fact national in scope and organized in accordance with the Act. In sustaining the discharge, the Court construed the Act to permit alternative union membership only in certain very narrow circumstances and even then only in certain qualified organizations.

After a dispositive analysis of the legislative history of the union shop amendments, the Court concluded that Congress enacted section 2, Eleventh (c) solely to apply in a situation peculiar to the operating service on the railroads, namely, to those employees who temporarily "shuttle back and forth" between crafts represented by different labor organizations. While job mobility posed no serious difficulty when union membership was voluntary, the union shop amendments as originally proposed would have created a severe problem for some operating employees.[11] The solution was to provide that the union's security provisions covering the craft to which a member was temporarily transferred could be satisfied during his temporary stay therein by alternative membership in the union which represented the craft in which he was regularly assigned.

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[11] The Committee Bill simply permitted union shop agreements compelling membership in the union representing the craft or class in which the worker was employed. "Under the original union-shop contract, such a change from craft to craft, even though temporary, would mean that the employee would either have to belong to two unions—*one representing each of his crafts*—or would have to shuttle between unions as he shuttles between jobs. The former alternative would, of course, be expensive and sometimes impossible, but the latter would be complicated and might mean loss of seniority and union benefits." *Pennsylvania Railroad Co. v. Rychlik, supra* at 490. (Emphasis supplied.)

The holding of the Court in *Rychlik* on this point is strong and unequivocal:

> "It thus becomes clear that the only purpose of section 2, Eleventh (c) was a *very narrow one*—to prevent compulsory *dual unionism* or the necessity of changing from one union to another when an employee temporarily changes crafts. The aim of this section, which was drafted by the established unions themselves, quite evidently was not to benefit rising new unions by permitting them to recruit members among employees who are represented by another labor organization. *Nor was it intended to provide employees with a general right to join unions other than the designated bargaining representative of their craft, except to meet the narrow problem of intercraft mobility." Pennsylvania Railroad Co. v. Rychlik, supra,* at 492-93. (Emphasis supplied.)

No blanket "union shopping" rights were conferred and there was no intent "to allow employees to choose between unions" (352 U.S. 480 at 492, fn. 29). As the Court subsequently stated (352 U.S. at 494):

> "In other words, once a union has lawfully established itself for a period of time as the authorized bargaining representative of the employees under a union shop contract, Congress [conferred no] 'right' of employees to choose between membership in it and another competing union. If Congress intended to confer such right, it would scarcely have denied the right to nonoperating employees of the railroads or industrial employees under the National Labor Relations Act. The purpose of Section 2, Eleventh (c) was simply to solve the problem of intercraft mobility under railroad union-shop contracts."

Accordingly, this Court held in *Rychlik* that two conditions implicit in section 2, Eleventh (c) are to be met before alternative union membership must be provided

under a union shop agreement: (1) the employee to whom alternative union membership is available must actually be involved in a temporary transfer to a class or craft represented by another labor organization; and (2) the employee must be subject to compulsory dual unionism, *i.e.*, a different union must represent the craft or class to which the employee may be transferred, and it must hold a union shop contract that would otherwise apply to him.[12]

Significantly, it is this interpretation of the statute that, as the Court pointed out in *Machinists v. Street*, 367 U.S. 740, at 764, fn. 15, is most "consistent" with the overall purpose of the union shop amendment; namely, to eliminate "free riders," since in all cases the union that benefits from compulsory membership will in fact be performing the functions of a statutory representative on the property.

To be sure, plaintiffs in *Rychlik* sought to satisfy their union shop obligation by joining a rival organization that had not yet qualified to participate in the designation of labor representative on the National Railroad Adjustment Board. However, it is indeed presumptuous to contend that this Court in *Rychlik* made no ruling relevant to the instant case. Almost one-half of the opinion was devoted to a definitive statement of principles controlling the interpretation of Section 2, Eleventh (c), and it cannot be seriously contended that the Court's statements therein are obiter dictum.

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[12] As the Court stated in *Rychlik, supra* at 490: "So Congress faced the problem of reconciling the union shop with some protection to employees who shifted from one craft to another one represented by a different labor organization under a union shop contract. The solution, of course, was evident: to provide that if a fireman, for example, is temporarily promoted to engineer, he can satisfy the union-shop contract of the engineers although still remaining a member of the union representing the firemen."

In *Rohrer v. Conemaugh & Black Lick Railroad Co.*, 359 F.2d 127 (3rd Cir. 1966), the Court of Appeals for the Third Circuit flatly held that *Rychlik* is just as applicable to a "qualified" railroad union as it was to UROC, and that alternative union membership need not be permitted unless an operating employee is involved in a temporary transfer into the representational jurisdiction of another union holding a union security contract on the property.

The Court in *Rohrer* cogently pointed out that *both the employee claiming protection* under section 2, Eleventh (c), *and the alternate union must meet the test* implicit in the statutory purposes:

> "There is clearly no merit to the contention that this case presents us with a situation for the application of § 152, Eleventh (c). Appellant is not faced with the dilemma of intercraft mobility. The union here represents all the employees of the Railroad without regard to craft or class delineation. Appellant in this case is attempting to accomplish exactly what the *Rychlik* case holds he was not entitled to under the Act—that is, the Act provides employees with a right to change unions *only* to meet the narrow problem of intercraft mobility. 352 U.S. at 492-93." (359 F.2d 127). (Emphasis in original.)

In short, only employees involved in temporary intercraft transfers must be given the right to alternative membership, and the union to which they belong must hold the bargaining rights for one of the crafts involved. Otherwise it is impossible to visualize the manner in which seniority rights are jeopardized by union shop agreements in the operating crafts.

Rohrer cannot be distinguished upon the ground that it involves a multi-craft unit represented by a single union or was an industrial entity organized on other than craft units. Certifications by the National Mediation Board on

the Conemaugh & Black Lick Railroad Company demonstrate that representation elections and certifications of the collective bargaining representatives therein is by craft.[13] Although there may have been no union but the Steelworkers on the Conemaugh & Black Lick, this fact was material only to demonstrate that the dilemma of intercraft mobility could not, for that reason, confront Mr. Rohrer. This is the identical situation in the instant case. The individual members of the respondent Switchmen's Union are not confronted with any dilemma of intercraft mobility. On the petitioner railroad, the parties strictly limited their agreement to preclude alternative membership only in those instances where employees will not be subject to transfer to a craft within the jurisdiction of a different bargaining representative.[14] In each case, the principle is the same, and the *Rychlik* reasoning applies.

Thus, despite the definitive analysis of the legislative history of section 2, Eleventh provided by this Court in *Rychlik* and *Street*, respondents must contend that Congress intended by subparagraph (c) of section 2, Eleventh to foster a practice of substantial minority union enclaves in the various bargaining units. In other words, subpara-

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[13] Certification entered by the National Mediation Board in Case No. R-236, dated April 23, 1937, relative to the election of the Brotherhood of Railroad Trainmen as the duly designated and authorized bargaining representative of employees in the commonly referred category of train and yard service employees and of the BLF&E as the bargaining representative of the engine service employees; and certifications by the Board in Case Nos. R-1904 and R-2851, dated October 1, 1947, and June 23, 1954, respectively, relative to a representational dispute concerning the craft of class of locomotive engineers, employees of the Conemaugh & Black Lick Railroad Company. BRT's qualified status, also relied upon by respondent Switchmen's Union herein, and the Board's certifications to Steelworkers on a craft basis shows that *Rohrer* is not a special situation limited to a peculiar set of facts.

[14] See *Birkholz, supra,* 391 F. 2d at 289-90, n. 1.

graph (c) must be read to confer a right on any employee to satisfy the requirement of membership under a union shop agreement by joining or belonging to any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of any craft or class in engine, train, yard, or hostling service.[15] Under this interpretation of the Act, the employee has an unqualified choice in selecting the union to which he desires to belong. It would have nothing to do with protection of seniority during temporary transfers. An analysis of the legislative history clearly demonstrates the error in this chain of reasoning. See also, *Pennsylvania R. Co. v. Rychlik, supra,* at 492, fn. 29.

The initial bills considered by both the Senate and House Committees contained no alternative union mem-

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[15] The opinion below and that in *O'Connell v. Erie Lackawanna R. Co.* 391 F.2d 156 (2d Cir. 1968), justified this approach on bases which are less than real. In *O'Connell,* the concept was forwarded that Congress intended to permit an employee to satisfy the union shop requirements by membership in any operating union, whether or not it was the bargaining agent for any craft, on the basis of changes in the bargaining representatives under Section 2, Ninth. *Id.* at 162. That theory begs the ultimate question, for the same situation exists in the nonoperating crafts and in bargaining units under the jurisdiction of the National Labor Relations Board. When the Machinists supplant the Auto Workers, the employees supporting the latter know they must join the former, and no one is concerned with their wishes.

In this case, the court below felt that a contrary ruling would mean that each employee would be faced with the necessity of proving rights in another craft and the courts, therefore, would be burdened with *ad hoc* adjudications in a large number of individual cases. *Id.* at 293. However, these rights appear on the face of the seniority rosters of the various crafts, which rosters are posted throughout the seniority districts. Each individual is knowledgeable about his seniority. Further, even under the approach of the Second and Seventh Circuits, an employee involved in a temporary transfer, which is the only time that situation could arise, may still be required to furnish proof of membership. See cf. *Brotherhood of R. R. Trainmen v. Smith,* 251 F.2d 282 (6th Cir. 1958).

bership provisions of any kind and were intended to wipe out minority union enclaves in their entirety.[16] In fact, the original proposal was quite similar to that contained in the National Labor Relations Act in that the employee was required to belong to the authorized bargaining representative. These bills, nevertheless, had the support of the Railway Labor Executives' Association representing virtually all the "standard" railway unions, including the Switchmen's Union, the Order of Railway Conductors, and the Brotherhood of Locomotive Firemen and Enginemen.[17] And, as finally enacted, subparagraph (c) of sec-

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[16] See Hearings on H. R. 7789 Before the Committee on Interstate and Foreign Commerce, 81st Cong. 2d Sess. 1 (1950) wherein railway labor representatives, George Harrison of the Railway Labor Executives' Association and Harry See of the Brotherhood of Railroad Trainmen, testified in that regard. *Id.* at 31, 41. See also subparagraph (a) of the original bill which permitted the bargaining representative to make an agreement requiring that "all employees shall become members of the labor organization representing the craft or class of such employees."

[17] Hearings on H. R. 7789, *supra*, note 16, at 6. The same three organizations, which initially advocated a strict union shop, are now opposed to an interpretation limiting alternative membership to employees involved in temporary transfers and then only in the organizations representing the interrelated crafts on the particular railroad involved. The Brotherhood of Railroad Trainmen and BLE opposed the original bill.

BLE continued to object to the bill and subsequently through its chief executive refused to endorse the amended version though not opposed to its passage. 96 CONG. REC. 16261 (Senate 1950). Purportedly, this view was in deference to a resolution of the 1950 BLE Convention. *Proceedings of the Eleventh Triennial Convention,* Grand International Brotherhood of Locomotive Engineers, pp. 862-3 (Cleveland, Ohio, June 23, 1950). The committee report adopted by the BLE convention recommended opposition to Senate Bill 3295 and H. R. 7789 in their original form. Many diverse and inconsistent reasons were submitted in support of the policy resolution, ranging from objections to compulsion through a finding that BLE would lose more members to BLF&E than it would gain since its members set back firing would have to belong to BLF&E (a strict interpretation) to the conclusion that BLF&E with a floating prospective membership would retain its members while work-

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tion 2, Eleventh did not provide an "alternate membership" provision for the railway employees in the "non-operating" crafts.

It was a proposal by the Brotherhood of Railroad Trainmen that first raised the intercraft transfer issue in relation to employees in the "operating" crafts and first presented a solution to the problem based upon granting the employee a choice of membership in either the craft representative of the craft in which he was performing work or the craft representative of the craft in which he held employment rights.[18] At first, the House Committee concluded that any amendment concerning the narrow problem of intercraft mobility in the operating crafts was unnecessary and stated in its report:

> "During Committee consideration of the bill, questions were raised as to the status of employees who are temporarily promoted or demoted from one closely related craft or class to another. While, under the authority granted by the bill, no single agreement could require membership in more than one union, it was contended that as a practical matter this result might follow from two or more agreements between carriers and labor organizations, and, furthermore, that some employees might, in order to retain certain union benefits, feel obliged to be members of more than one union. The Committee decided that these questions should be resolved by negotiation and collective bargaining." [19]

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ing as engineers (a shuttling back and forth interpretation contrary to the initial statutory language). BLE's national legislative representative continued to oppose any union shop amendment, apparently on the basis that anything BLF&E supported must naturally be detrimental to BLE. 96 CONG. REC. 16330 (Senate 1950).

[18] Hearings on H. R. 7789 *supra*, note 16, at pp. 32-33.

[19] H. R. Rep. No. 2811, Committee on Interstate and Foreign Commerce on H. R. 7789, 81st Cong. 2d Sess. (1950).

Later on the floor of the Senate, the Committee offered a proviso to its bill,[20] dealing with the intercraft temporary transfer problem and providing simply that "no such [union shop] agreement shall require membership in more than one labor organization."[21] Senator Hill, floor manager of the bill, explained its purpose as follows:

> "This proviso was attached because some question was raised as to the status, under this bill, of employees who are temporarily promoted or demoted from one closely related craft or class to another. This practice, with minor exceptions, occurs only among the train and engine-service employees. Thus, a fireman may be promoted to a position as engineer for a short time and then due to a reduction in force be returned to his former position as fireman. It is the intention of this proviso to assure that in the case of such promotion or demotion, as the case may be, the employee involved shall not be deprived of his employment because of his failure or refusal to join the union representing the craft or class in which he is located if he retains his membership in the union representing the craft or class from which he has been transferred." [22]

It is apparent from the legislative history of the bill that Congress did not outwardly reject the Trainmen's proposal but severely restricted and narrowed it.[23] At the

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[20] S. Rep. No. 2262, Committee on Labor and Public Welfare on S. 3295, 81st Cong. 2d Sess. (1950).

[21] 96 Cong. Rec. 15735-15736 (Senate 1950).

[22] 96 Cong. Rec. 15736 (Senate 1950).

[23] By emphasizing the last clause of the proposal which referred to "the duly designated or recognized craft or class representative of any one of them," the court in *O'Connell v. Erie Lackawanna R. Co.*, 391 F.2d 156, at 160 (2d Cir. 1958), found contrary to all other indications that Congress did not intend to restrict membership to the craft representatives. A stronger and more plausible argument can be made that the legislative body

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outset, Congress began with a strict union shop provision which limited membership to the union representing the craft or class in which the employee was working. The proviso was not intended to circumscribe this basic principle. In other words, the proviso was not inserted to provide the employee with an unlimited choice of unions for membership or to allow him this choice in every given instance. However, the language of the Trainmen proposal would have provided the employee with an unlimited choice of membership between the bargaining representatives of any craft in which he held employment or promotion rights, regardless of his employment status at any given time. Thus, under its proposal, if an employee of a given carrier in the craft of trainmen or brakemen, represented by that union, was subsequently promoted and regularly assigned to the craft of conductors, represented by the Order of Railway Conductors on that carrier, he could satisfy the membership requirement of the latter's union shop agreement by continuing to maintain his membership in the former organization, even if he had been a conductor for one, two, five or twenty years.[24] Said

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was rejecting the preceding language which concerned situations beyond the temporary transfer or shuttling situation and left the choice of organizations to the employee. See *Pennsylvania Railroad Co. v. Rychlik, supra* at 492, fn. 29.

Since train service employees begin employment as brakemen, which craft is generally represented by BRT, and are, after several years promoted to conductors, the proposal naturally inured to the benefit of BRT. The fledgling employee would have employment rights only as a brakeman and would be required to be a BRT member. On the other hand, the 30 year veteran conductor, having retained seniority rights as a brakeman, could belong to BRT, if it were the representative of that craft.

[24] Citing certain references to the interpretation of BLE's national legislative representative [96 CONG. REC. 17052 (1951)], the court in *O'Connell v. Erie Lackawanna, supra* at 161, said this is exactly what Section 2, Eleventh (c) was intended to do.

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proposal completely vitiated the basic premise of the draftsmen of the bill. That Congress did intend, however, to provide certain employees, under limited circumstances, an opportunity of alternative membership in line with the Trainmen's recommendation is clear. But this opportunity was restrictively conditioned to conform to the original and more traditional approach of requiring membership in the union representing the bargaining unit.[25] Thus, it was the legislative intent to permit alternative membership only when all of the following criteria are met:

(1) For the question of alternative membership to arise, there must be two or more closely related crafts represented by different unions and between which some employees temporarily flow back and forth;

(2) The employee who is entitled to alternative membership in satisfaction of his union security obligation to either craft representative must be involved in a temporary promotion, demotion or assignment to the craft closely related to the one in which he is regularly assigned and works;

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Actually, it would appear that he was viewing the provision as including a strict union shop except in the shuttling back and forth situation. In 1950, there were more firemen than engineers, and the firemen would be in that status for many years (5 to 10) before promotion. Even after promotion to engineer, the individual employee would be often assigned as a fireman for a long period of years. However, BLE could not tap the first source at all, and, under the circumstances, most junior "engineers" could and would conceivably retain membership in BLF&E. At that time, BLE stood in the worst position; and one of its representatives therefore opposed the ultimately enacted bill. It is submitted that BLE's position in 1950 sustains the interpretation urged herein rather than detracting therefrom.

[25] In fact, the "right" of alternative membership in satisfaction of a union shop agreement is so restrictive in the view of this Court that it is not considered a "choice" by the employee. *Pennsylvania RR. Co. v. Rychlik, supra* at 492, fn. 29.

(3) Under the above related circumstances, the employee can choose to continue his membership in the union representing his regular craft or can shift to the union representing the craft in which he is temporarily working for periods of 60 to 90 days and subsequently can revert back to the union representing his regularly assigned craft when returning thereto;[26]

(4) The employee, granted the choice of alternative membership, must select membership in the union which is the duly designated bargaining representative of the craft in which he is regularly assigned or in which he is temporarily transferred and presently working, *i.e.*, the union in which he holds membership must have a collective bargaining agreement with the carrier for one of the two crafts.[27]

Basically, the sole aim of the proviso was to insure that no employee in a transitory stage of employment should be required to belong to two unions to insure protection of his employment rights as he shuttles back and forth between two crafts represented by different unions with union shop agreements.

Later, the Brotherhoods for the operating crafts, excluding BLE, agreed upon a substitute amendment, offered by the floor manager of the bill, which substitute became Section 2, Eleventh (c). In explaining the substitute amendment, Senator Hill stated that its purpose

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[26] 96 CONG. REC. 16268 (Senate 1950).

[27] Under the factual situation herein, the need for providing alternative membership as set forth in the criteria, described in points 1, 2 and 3 above, does not arise, because the employees are not involved in temporary promotions or transfers. In any event, the fourth mentioned point completely answers the issue of law before this Court, since Switchmen's Union is *not* the bargaining agent for any craft.

was identical to that of the earlier Committee amendment —no employee in any of the operating crafts of a railroad should be required to belong to more than one labor organization as a result of a temporary promotion or transfer—[28] and this Court has held accordingly.[29]

It is obvious from the foregoing that Congress did not intend to preserve minority union enclaves in the bargaining unit. Moreover, as has been shown, this Court has analyzed the legislative history of the union shop amendments at length on two separate occasions and concluded that Congress did not intend to confer "union shopping" rights, nor did it desire to assist dissident unions in recruiting and retaining members. Thus, any contention that Congress in effect conferred a right on the employee to satisfy his union shop commitment by belonging to a union that does not hold any bargaining rights or represent any employees on a railroad, is entirely unsupported by any authority. In fact, this position would be at direct variance with both the *Rychlik* and *Street* decisions.

As previously established, one of the two purposes of Section 2, Eleventh, was to reduce turmoil and strife among the employees of a railroad craft by preventing raiding by minority unions and by strengthening the bargaining representative of that craft. If the position of the opinion below is sanctioned, however, it would have to be on the basis that the intendment of section 2, Eleventh (c), was to foster minority unions in a craft represented by the bargaining agent chosen by a majority of the employees. In simple terms, the purpose of the subparagraph would be to promote two or more unions within a given bargaining unit. This approach should be rejected as leading to

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[28] 96 CONG. REC. 16261, 16328-16330 (Senate 1950).

[29] *Pennsylvania RR Co. v. Rychlik, supra* at 492-4.

proliferation of minority unions within the craft unit, as fomenting labor trouble, as promoting ineffective bargaining, and as potentially decreasing the opportunities for orderly and appropriate adjustment to the technological and functional changes presently occurring in the industry.

CONCLUSION.

For the above reasons, it is submitted that the union shop agreement herein is valid and lawful under the provisions of the Railway Labor Act. Accordingly, the decision below should be reversed.

Respectfully submitted,

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